

127

(3)

No. 08-1154

Supreme Court, U.S.  
FILED

APR 13 2009

OFFICE OF THE CLERK

In The  
**Supreme Court of the United States**

---

BRENT DEE JOHNSON,

*Petitioner,*

vs.

CLARENDON NATIONAL INSURANCE COMPANY,  
AMERICAN TRANS-FREIGHT LLC,  
ATF TRUCKING, LLC, and ATF LOGISTICS, LLC,

*Respondents.*

---

**On Petition For A Writ Of Certiorari  
To The Court Of Appeals Of Georgia**

---

**PETITIONER'S REPLY BRIEF**

---

KENNETH L. SHIGLEY  
CHAMBERS, AHOLT & RICKARD, LLP  
One Midtown Plaza  
1360 Peachtree Street, Suite 910  
Atlanta, Georgia 30309

Phone: 404-253-7862  
Fax: 404-253-7875  
Email: ken@carllp.com

*Counsel for Petitioner*

## TABLE OF CONTENTS

	Page
<b>ARGUMENT.....</b>	<b>1</b>
1. The contention that the petition is untimely is without merit .....	1
2. The contention that the notice of intent to file a petition for certiorari was procedurally defective is without merit, as the precedents in this Court favor considering the merits of the case rather than elevating form over substance.....	1
3. While every case involves a factual background, this case turns entirely upon the interpretation and application of federal law .....	3
4. The Court could benefit from calling for the views of the Solicitor General regarding the interpretation of the complex federal regulatory scheme in question, as the Brief in Response does not address the substantive issues of federal law in the case .....	3

### Supplemental Table of Appendices

A. Supreme Court of Georgia's Denial of Motion for Reconsideration .....	App. 1
B. Motion to Vacate Orders Due to Automatic Bankruptcy Stay.....	App. 2
C. Suggestion of Bankruptcy .....	App. 4

**TABLE OF CONTENTS – Continued**

	Page
D. Amended and Supplemental Notice of Intent to File Petition for Writ of Certiorari in the Supreme Court of the United States Filed in the Court of Appeals of Georgia.....	App. 8
E. Amended and Supplemental Notice of Intent to File Petition for Writ of Certiorari in the Supreme Court of the United States Filed in the Supreme Court of Georgia.....	App. 11

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Becker v. Montgomery</i> , 532 U.S. 757, 121 S.Ct. 1801 (2001).....	2
<i>Foman v. Davis</i> , 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).....	1
<i>Smith v. Barry</i> , 502 U.S. 244, 112 S.Ct. 678 (1992).....	1
<i>Thomas v. State of Arizona</i> , 356 U.S. 390, 78 S.Ct. 885 (1958).....	2
<i>Torres v. Oakland Scavenger Co.</i> , 487 U.S. 312, 108 S.Ct. 2405 (1988).....	1
<b>COURT RULES</b>	
Advisory Committee's Notes on Fed. Rules App. Proc. 3, 28 U.S.C. App., p. 590.....	2

## **ARGUMENT**

### **1. The contention that the petition is untimely is without merit.**

The motion for reconsideration of the denial of certiorari, equivalent to a motion for rehearing, was denied in the Supreme Court of Georgia on December 16, 2008. [Supp. App. A] Ninety days from denial of the motion for reconsideration was March 16, 2009. This Petition was filed in the Supreme Court on March 13, 2009, prior to expiration of the ninety day time limit. The contention of untimeliness is without merit.

### **2. The contention that the notice of intent to file a petition for certiorari was procedurally defective is without merit, as the precedents in this Court favor considering the merits of the case rather than elevating form over substance.**

This Court has liberally construed the requirements of a notice of appeal, holding that when papers are “technically at variance with the letter of [a rule on notice of appeal], a court may nonetheless find that the litigant has complied with the rule if the litigant’s action is the functional equivalent of what the rule requires.” *Smith v. Barry*, 502 U.S. 244, 246, 112 S.Ct. 678 (1992). “Mere technicalities” should not stand in the way of consideration of a case on its merits. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-17, 108 S.Ct. 2405, 2409 (1988); *Foman v.*

*Davis*, 371 U.S. 178, 181, 83 S.Ct. 220, 227, 9 L.Ed.2d 222 (1962).

Petitioner did file in the Supreme Court of Georgia, which had denied certiorari, a notice of intent to file a petition for writ of certiorari in this Court. At that time a motion to vacate the denial of reconsideration was pending [Supp. App. B], as the denial order was entered during the pendency of a bankruptcy stay due to the ATF Respondents' chapter 11 bankruptcy filing, so the date of finality of the denial of certiorari was unclear at that time. [Supp. App. C]

There was never any doubt about the intent to seek review by this Court, as the Petition addresses matters of the preemptive effect of federal law affecting public safety and financial responsibility in interstate trucking, which the state appellate courts refused to honor.

The Advisory Committee's Notes on Federal Rules of Appellate Procedure explain that the Rules were designed "to prevent the loss of a right to appeal through inadvertent omission" when "it is objectively clear that [the] party intended to appeal." Advisory Committee's Notes on Fed. Rules App. Proc. 3, 28 U.S.C. App., p. 590. A procedural defect of this sort, if indeed it is a defect, is not fatal. See, e.g., *Becker v. Montgomery*, 532 U.S. 757, 121 S.Ct. 1801 (2001) (defect in notice of appeal, omitting signature, curable); *Thomas v. State of Arizona*, 356 U.S. 390, 78 S.Ct. 885 (1958).

Petitioner has cured the alleged defect by filing a notice with the Court of Appeals of Georgia, *nunc pro tunc* [Supp. App. D] and by filing an amended notice in the Supreme Court of Georgia, *nunc pro tunc*. [Supp. App. E]

Therefore, even if the notice of appeal were technically imperfect, the precedents of this Court favor considering the merits of the case rather than elevating form over substance.

**3. While every case involves a factual background, this case turns entirely upon the interpretation and application of federal law.**

All cases involve application of law to facts. In this case, the facts are inextricably intertwined with interpretation of federal law. Every statement of the lower court regarding facts is inextricably intertwined with its misinterpretation and misapplication of the federal Act and Regulations involved in this appeal.

**4. The Court could benefit from calling for the views of the Solicitor General regarding the interpretation of the complex federal regulatory scheme in question, as the Brief in Response does not substantively address the substantive issues in the case.**

For all its rhetorical flourish and procedural nit-picking, the Brief in Response does not address the text, purpose, policy or history of the Act or Regulations, or the national body of case law interpreting them.

This case turns entirely upon interpretation of a federal statute and federal regulations that have not been addressed in the Supreme Court in a generation, and have never been the subject of direct analysis in this Court. The Court could benefit from issuing a call for the views of the Solicitor General regarding the correct interpretation of the federal statute and regulations in question.

If the Solicitor General responds that it is acceptable for an interstate motor carrier to evade federal safety and financial responsibility requirements by having an agent avoid use of either a written lease or the word "lease" in an informal arrangement to hire a truck and driver, so be it. But such an opinion from the government is unlikely.

Respectfully submitted,

KENNETH L. SHIGLEY  
Georgia Bar No. 642744

*Counsel for Petitioner*

Chambers, Aholt &  
Rickard, LLP  
One Midtown Plaza  
1360 Peachtree Street,  
Suite 910  
Atlanta, GA 30309

Phone: 404-253-7862  
Fax: 404-253-7875  
Email: ken@carllp.com

App. 1

**SUPPLEMENTAL APPENDIX A  
SUPREME COURT OF GEORGIA**

Case No. S08C2066      Atlanta, December 16, 2008

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

BRENT DEE JOHNSON v. CLARENDON NATIONAL INSURANCE COMPANY et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunstein, P.J., who dissents.

**SUPREME COURT OF  
THE STATE OF GEORGIA**

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

*Therese S. Barnes, Clerk*

---

**SUPPLEMENTAL APPENDIX B**  
**IN THE SUPREME COURT**  
**STATE OF GEORGIA**

BRENT DEE JOHNSON,  
Petitioner

vs.

CLARENDON NATIONAL  
INSURANCE COMPANY,  
AMERICAN TRANS-  
FREIGHT LLC, ATF  
TRUCKING, LLC, and  
ATF LOGISTICS, LLC,

CASE NO. S08C2066  
COURT OF APPEALS  
CASE NO. A08AO119

Respondents.

**MOTION TO VACATE ORDERS DUE  
TO AUTOMATIC BANKRUPTCY STAY**

On October 30, 2008, counsel for Respondents filed a Suggestion of Bankruptcy in this Court (Exhibit A), based upon the Chapter 11 petition filed by GSW Holdings, parent company of AMERICAN TRANS-FREIGHT LLC, ATF TRUCKING, LLC, and ATF LOGISTICS, LLC. Petitioner filed Motion for Relief from Stay, limiting recovery to the liability insurance and supersedeas bond in this case, in the United States Bankruptcy Court for the District of Delaware. (Exhibit B) The Motion for Relief from Stay is scheduled for a hearing in the United States Bankruptcy Court for the District of Delaware on January 14, 2009. (Exhibit C)

### App. 3

In beginning work on a petition for certiorari to be filed in the Supreme Court of the United States, counsel noted that, the Court denied the Petition for Writ of Certiorari, November 26, 2008 and denied the Motion for Reconsideration on December 15, 2008, both while the automatic bankruptcy stay was in effect. It appears that both Petitioner and the Court may have both inadvertently overlooked the effect of the bankruptcy stay.

Therefore, the Petitioner respectfully moves that the orders of November 26, 2008 and December 15, 2008, be vacated pending an order providing relief from the automatic bankruptcy stay. Counsel for Petitioner will notify the Court when the stay is lifted.

This 22nd day of December, 2008.

/s/ Kenneth L. Shigley  
KENNETH L. SHIGLEY  
Georgia Bar No. 642744  
Chambers, Aholt & Rickard, LLP  
1360 Peachtree Street, Suite 910  
Atlanta, Georgia 30309  
Phone: 404.253.7866  
Fax: 404.253.7875  
Email: ken@carllp.com

---

**SUPPLEMENTAL APPENDIX C  
IN THE SUPREME COURT  
STATE OF GEORGIA**

BRENT DEE JOHNSON,	)	
Petitioner	)	
vs.	)	
CLARENDON NATIONAL INSURANCE COMPANY,	)	Case No. S08C2066
AMERICAN TRANS-FREIGHT LLC, ATF	)	Court of Appeals
TRUCKING, LLC, AND	)	Case No. 8A0119
ATF LOGISTICS, LLC,	)	
Respondents.	)	

---

**SUGGESTION OF BANKRUPTCY**

**PLEASE TAKE NOTICE** that on October 20, 2008, the defendants, American Trans-Freight, LLC, ATF Trucking, LLC, ATF Logistics, LLC, filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware (Case Nos. 08-12434 (PJW), 08-12443 (PJW), 08-12444 (PJW), and jointly administered under Case No. 08-12430 (PJW)). Accordingly, this action is automatically stayed pursuant to 11 U.S.C. § 362(a).

App. 5

Dated: October 30, 2008

Respectfully submitted,  
Hall, Booth, Smith & Slover

/s/ James H. Fisher  
James H. Fisher, II  
Ga. Bar 261850  
Counsel ATF Trucking, LLC,  
American Trans-Freight, LLC,  
ATF Logistics, LLC

1180 W. Peachtree Street, N.W., #900  
Atlanta, Georgia 30309-3479  
(404) 954-5000

---

App. 6

IN THE SUPREME COURT  
STATE OF GEORGIA

BRENT DEE JOHNSON,	)	
Petitioner	)	
vs.	)	
CLARENDON NATIONAL INSURANCE COMPANY,	)	Case No. S08C2066
AMERICAN TRANSPORTATION FREIGHT LLC, ATF	)	Court of Appeals
TRUCKING, LLC, AND	)	Case No. 8A0119
ATF LOGISTICS, LLC,	)	
Respondents.	)	

---

**CERTIFICATE OF SERVICE**

This is to certify that I have this day served a copy of the within and foregoing Suggestion of Bankruptcy upon all parties by mailing a copy of the same to their attorney of record in a properly addressed and stamped envelope as follows:

Kenneth L. Shigley, Esq.  
Shigley Law Firm, LLC  
3166 Mathieson Drive,  
Ste. 200  
Atlanta, Georgia 30305

Tommy Lee Maddox, Esq.  
201 Bombay Lane  
Roswell, Georgia 30076

Norman S. Fletcher  
Brinson, Askew, Berry, Seigler,  
Richardson and Davis  
615 West First Street  
P.O. Box 5007  
Rome, Georgia 30162-5007

App. 7

This 30th day of October, 2008.

/s/ James H. Fisher

James H. Fisher, II, Esq.

Georgia Bar No. 261850

Attorney for Respondents

---

**SUPPLEMENTAL APPENDIX D  
IN THE COURT OF APPEALS  
STATE OF GEORGIA**

CLARENDON NATIONAL )	
INSURANCE COMPANY, )	
AMERICAN TRANS- )	
FREIGHT LLC, ATF )	
TRUCKING, LLC, and )	
ATF LOGISTICS, LLC, )	
Appellants )	DOCKET NO.
vs. )	A08A0119
BRENT DEE JOHNSON, )	
Appellee. )	
)	

---

**AMENDED AND SUPPLEMENTAL NOTICE  
OF INTENT TO FILE PETITION FOR  
WRIT OF CERTIORARI IN THE  
SUPREME COURT OF THE UNITED STATES**

Petitioner previously filed in the Supreme Court of Georgia on January 7, 2009, a Notice of Intent to File a Petition for Writ of Certiorari in the Supreme Court of the United States. At the time that was filed there was pending a Motion to Vacate the order denying the petition for certiorari and order denying reconsideration of certiorari on the ground that a bankruptcy stay was in effect when those orders were entered. Petitioner hereby files this supplemental notice of intent to file a Petition for Writ of Certiorari

App. 9

in the Supreme Court of the United States, *nunc pro tunc* to December 23, 2009.

The United States Supreme Court has liberally construed the requirements of a notice of appeal, holding that when papers are “technically at variance with the letter of [a rule on notice of appeal], a court may nonetheless find that the litigant has complied with the rule if the litigant’s action is the functional equivalent of what the rule requires.” *Smith v. Barry*, 502 U.S. 244, 246, 112 S.Ct. 678 (1992). “Mere technicalities” should not stand in the way of consideration of a case on its merits. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-17, 108 S.Ct. 2405, 2409 (1988); *Foman v. Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 220, 9 L.Ed.2d 222 (1962).

The Supersedeas Bond ordered by the trial court must remain in force pending a decision of the Supreme Court of the United States.

This 10th day of April, 2009, nunc pro tunc December 26, 2008.

/s/ Kenneth L. Shigley  
KENNETH L. SHIGLEY  
Georgia Bar No. 642744

Chambers, Aholt & Rickard, LLP  
1360 Peachtree Street, Suite 910  
Atlanta, Georgia 30309  
Phone: 404.253.7866  
Fax: 404.253.7875  
Email: ken@carllp.com

---

**CERTIFICATE OF SERVICE**

This is to certify that I have served opposing counsel in the above-styled matter with a copy of **AMENDED AND SUPPLEMENTAL NOTICE OF INTENT TO FILE PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES** by depositing in the United States Mail a copy of the same, with adequate postage affixed thereon, addressed to the following:

James F. Fisher, II, Esq.  
Denise W. Spitalnick, Esq.  
W. Scott Henwood, Esq.  
Hall, Booth, Smith & Slover, PC  
1180 West Peachtree Street, NW  
Atlantic Center Plaza, Suite 900  
Atlanta, GA 30309-3479

This the 10th day of April, 2009.

Respectfully submitted,

/s/ Kenneth L. Shigley  
Kenneth L. Shigley  
Georgia Bar No. 642744  
Attorney for Petitioner

Chambers, Aholt & Rickard, LLP  
1360 Peachtree Street, Suite 910  
Atlanta, Georgia 30309  
Phone: 404.253.7866  
Fax: 404.253.7875  
Email: ken@carllp.com

---

**SUPPLEMENTAL APPENDIX E  
IN THE SUPREME COURT  
STATE OF GEORGIA**

BRENT DEE JOHNSON,

Petitioner

vs.

CLARENDON NATIONAL  
INSURANCE COMPANY,  
AMERICAN TRANS-  
FREIGHT LLC, ATF  
TRUCKING, LLC, and  
ATF LOGISTICS, LLC,

CASE NO. S08C2066  
COURT OF APPEALS  
CASE NO. A08A0119

Respondents.

**AMENDED AND SUPPLEMENTAL NOTICE  
OF INTENT TO FILE PETITION FOR  
WRIT OF CERTIORARI IN THE  
SUPREME COURT OF THE UNITED STATES**

After receiving Respondents' Suggestion of Bankruptcy on October 30, 2008, this Court denied without opinion the Petition for Writ of Certiorari, November 26, 2008 and denied with one dissent the Motion for Reconsideration on December 15, 2008. Both orders were entered while the automatic bankruptcy stay was in effect. Petitioner filed his initial Notice of Intent to File Petition for Writ of Certiorari in the Supreme Court of the United States on January 7, 2009. Petitioner hereby amends and supplements his initial notice of intent to file a Petition for Writ of Certiorari in the Supreme Court of the United States,

App. 12

in order to cure an alleged technical procedural defect of said notice.

The United States Supreme Court has liberally construed the requirements of a notice of appeal, holding that when papers are “technically at variance with the letter of [a rule on notice of appeal], a court may nonetheless find that the litigant has complied with the rule if the litigant’s action is the functional equivalent of what the rule requires.” *Smith v. Barry*, 502 U.S. 244, 246, 112 S.Ct. 678 (1992). “Mere technicalities” should not stand in the way of consideration of a case on its merits. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-17, 108 S.Ct. 2405, 2409 (1988); *Foman v. Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 220, 9 L.Ed.2d 222 (1962).

The Supersedeas Bond ordered by the trial court must remain in force pending a decision in the Supreme Court of the United States.

This 10th day of April 2009, nunc pro tunc 23rd day of December, 2008.

/s/ Kenneth L. Shigley  
KENNETH L. SHIGLEY  
Georgia Bar No. 642744

Chambers, Aholt & Rickard, LLP  
1360 Peachtree Street, Suite 910  
Atlanta, Georgia 30309  
Phone: 404.253.7866  
Fax: 404.253.7875  
Email: ken@carllp.com

---

**CERTIFICATE OF SERVICE**

This is to certify that I have served opposing counsel in the above-styled matter with a copy of **AMENDED AND SUPPLEMENTAL NOTICE OF INTENT TO FILE PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES** by depositing in the United States Mail a copy of the same, with adequate postage affixed thereon, addressed to the following:

James F. Fisher, II, Esq.  
Denise W. Spitalnick, Esq.  
W. Scott Henwood, Esq.  
Hall, Booth, Smith & Slover, PC  
1180 West Peachtree Street, NW  
Atlantic Center Plaza, Suite 900  
Atlanta, GA 30309-3479

This the 10th day of April, 2009.

Respectfully submitted,

/s/ Kenneth L. Shigley  
Kenneth L. Shigley  
Georgia Bar No. 642744  
Attorney for Petitioner

Chambers, Aholt & Rickard, LLP  
1360 Peachtree Street, Suite 910  
Atlanta, Georgia 30309  
Phone: 404.253.7866  
Fax: 404.253.7875  
Email: ken@carllp.com

---